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Supreme Court of the United States

OCTOBER TERM, 1940

No. 15

**FLEISHER ENGINEERING & CONSTRUCTION CO.,
AND JOSEPH A. BASS, DOING BUSINESS AS
JOSEPH A. BASS CO., ET AL., PETITIONERS,**

vs.

**THE UNITED STATES OF AMERICA, FOR THE USE
AND BENEFIT OF GEORGE S. HALLENBECK,
ETC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA for the use and benefit
of George S. Hallenbeck, doing business under the as-
sumed name and style of Hallenbeck Inspection and
Testing Laboratory,

Appellee,

vs.

FLEISHER ENGINEERING & CONSTRUCTION CO.,
JOSEPH A. BASS, doing business as Joseph A. Bass
Co., ROYAL INDEMNITY COMPANY and MARY-
LAND CASUALTY COMPANY, /

2

Appellants,

and other defendants named but not served with the sum-
mons.

Statement Under Rule XIII.

This action was brought in the United States District
Court for the Western District of New York under the
so-called Miller Act of August 24, 1935, Chapter 642, sec-
tions 1, 2, 3 and 4, 40 USCA, sections 270 A, 270 B, 270 C,
and 270 D, to recover for work and labor furnished in work
required for construction of the super-structure of Kenfield
Housing Project H-6703 in Buffalo, N. Y., under standard
form of contract and government payment bond to the
United States of America, whereby the appellants, Fleisher
Engineering & Construction Co., and Joseph A. Bass, doing
business as Joseph A. Bass Co., were principals and the
defendants-appellants, Maryland Casualty Company and
Royal Indemnity Company and others were sureties.

3

Statement Under Rule XIII.

- 4 None of the defendants or other parties to the action have been arrested nor has any property been attached or arrested. No question has at any time been referred to a Commissioner or Commissioners, Master or Referee.

5 The Complaint of the United States of America for the use and benefit of George S. Hallenbeck was filed in the office of the Clerk of the United States District Court for the Western District of New York on August 24, 1938 and summons was issued thereon on that day. The summons was served on the defendant, Fleisher Engineering & Construction Co. on the 13th day of April, 1938 by the United States Marshal for the Western District of New York, and on the defendant, Royal Indemnity Company, on the 11th day of April, 1938, by the United States Marshal for the Southern District of New York. Proof of service on both of said defendants was filed in the clerk's office on the 15th day of April, 1938.

- 6 On the 14th day of May, 1938, the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., and Maryland Casualty Company voluntarily appeared in the action by Gibbons, Pottle & Pottle, their attorneys, by appearance that day filed.

On September 3, 1938, the defendant, Royal Indemnity Company, appeared by the aforesaid attorneys by a praeceipe that day filed. None of the other parties to the action have been served with the summons nor have any of them in any manner appeared. On September 10, 1938, separate answers were filed in the clerk's office on behalf of the defendants, Maryland Casualty Company, Royal Indemnity Company, Fleisher Engineering & Construction Co., and

Statement Under Rule XIII.

Joseph A. Bass, doing business as Joseph A. Bass Co., and 7
copies served upon the attorney for the plaintiff.

On December 10, 1938, the defendants above named filed and served interrogatories under the provisions of Rule 33 of the Rules of Civil Procedure, answers to which were filed in the clerk's office and served on January 28, 1939.

On March 1, 1938 an order was made at the March, 1939 Stated Term of the District Court denying the motion theretofore made by the aforementioned defendants for a summary judgment, which order was entered in the clerk's office on March 3, 1939. A motion was made at the same 8
time in a companion case for the use of J. H. Welch Company. An opinion was written by Hon. John Knight, District Judge, who granted said orders in the Welch case and referred to in his opinion in the case at bar, both of which opinions were filed in the clerk's office on February 27, 1939. On the 1st day of May, 1939, an order was made at the March, 1939, Stated Term of the said court upon motion of the plaintiff, which directed a summary judgment in favor of the plaintiff for the relief demanded in the complaint, which order was entered in the clerk's office on June 9, 1939, on which day the final judgment now appealed from 9
was also entered in said clerk's office. On June 13, 1939 the defendants filed in the clerk's office and served their written assignment of errors, supersedeas bond, and notice of appeal from the said final judgment.

The names in full of all parties to the action who have appeared or have been served with the summons are as above written.

Gibbons, Pottle & Pottle, are attorneys for the defendants, Fleisher Engineering & Construction Co., Joseph A.

Bill of Complaint.

- 10 Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company.

Edwin J. Culligan, Esq., 928 Liberty Bank Bldg., Buffalo, N. Y., is attorney for the plaintiff.

There has been no change in parties plaintiff or defendant since the commencement of the action.

Dated, Buffalo, N. Y., June 23, 1939.

11

FRANK GIBBONS,
One of the Attorneys for the
Defendants and Appellants,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Bill of Complaint.

▶ (Name of Court and Title of Action.)

- 12 United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, bring this their bill of complaint and allege:

FIRST: That the plaintiff is a resident of the County of Erie and State of New York, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory.

SECOND: That the defendant, Fleisher Engineering & Construction Co., is a corporation organized and existing under the laws of the State of Delaware.

Bill of Complaint.

THIRD: That the defendant, Joseph A. Bass, doing business as Joseph A. Bass Co., is a resident of the City of Minneapolis, Minn. 13

FOURTH: That the defendant, Royal Indemnity Company is a domestic corporation with its principal place of business in the City of New York, New York.

FIFTH: That the defendant, Maryland Casualty Company, is a Maryland Corporation with its principal place of business in the City of Baltimore and State of Maryland.

SIXTH: That on or about the 14th day of July, 1936, the United States of America, acting by the Federal Emergency Administrator of Public Works, and the defendants, the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., entered into a written contract whereby the said defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., agreed to furnish all the labor and materials and perform all work required for the construction of the superstructure for Kenfield Housing Project No. H-6703 in Buffalo, New York, for the consideration of the sum of Three Million nine hundred ninety-nine thousand four hundred dollars (\$3,999,400.00), which said contract is incorporated herein by reference thereto. 14 15

SEVENTH: That pursuant to the Act of Congress approved August 24th, 1935, the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., as Principal and the defendants, the Maryland Casualty Company and Royal Indemnity Company, *et al*, as sureties, on or about the 14th

Bill of Complaint.

- 16 day of July, 1936, duly executed a standard government form of payment bond to the United States of America, wherein and whereby the said defendant Principal and the defendant, Royal Indemnity Company, as surety, bound themselves, jointly and severally, in the amount of Three hundred fifty-nine thousand nine hundred forty-six dollars (\$359,946.00); and, the said defendant principal and the defendant, Maryland Casualty Company, as surety, bound themselves, jointly and severally in the sum of Seventy-nine thousand nine hundred eighty-eight dollars (\$79,988.00), conditioned that if the Principal, Fleisher
- 17 Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety be hereby waived, then this obligation to be void; otherwise to remain in full force and virtue, said bond being incorporated in said complaint more fully by reference thereto.
- 18 EIGHTH: The said bond was duly accepted by the United States of America, and upon such acceptance, the contract for the construction and completion of the buildings aforementioned was awarded to the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co. The said Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., as principal, and the said Maryland Casualty Company and the Royal Indemnity Company, as sureties, had imposed upon them,

Bill of Complaint.

jointly and severally, the liability, among other things, of seeing that prompt payment was made by said Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., to persons supplying labor and material in the prosecution of the work contemplated by said contract, but notwithstanding the duty imposed upon them, the said principal and the said sureties have broken the condition of the said bond in the manner as hereinafter set forth. 19

NINTH: That thereafter and during the months of March, April and May of 1937, the use plaintiff at the special instance and request of the Easthom Melvin Co. Inc. performed certain work and labor in the inspection and testing of materials on the aforesaid Kenfield Housing Project, all of which were of the agreed price and reasonable value of Ten hundred Twelve dollars and eighty-seven cents (\$1012.87), the terms of payment net cash 2% ten days. 20

TENTH: Upon information and belief that the said Easthom Melvin Co. Inc. was a subcontractor of the said defendants, Fleisher Engineering and Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co. and that the labor performed by this use plaintiff was required to be performed by the said defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., under its aforesaid contract with the United States of America and was so performed with the knowledge, consent and approval of the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the aforesaid mentioned project. 21

Bill of Complaint.

- 22 ELEVENTH: The said defendant, Easthom Melvin Co. Inc. failed and neglected to pay to the use plaintiff the said sum of Ten hundred twelve dollars and eighty-seven cents (\$1012.87) according to its contract and that within ninety days of the said due date, this use plaintiff duly notified the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., that the said Easthom Melvin Co. Inc. had failed and neglected to make the payment required and that said notice to the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., complied with all the rules and requirements of the statute for the perfecting of a right of action under the aforesaid mentioned bond.

TWELFTH: Upon information and belief that one year has not elapsed from the date of final settlement of the contract and that although due demand has been made upon the defendants, and each of them, no part of the said sum of Ten hundred twelve dollars and eighty-seven cents (\$1012.87) with interest, has been paid to the use plaintiff.

- 21 THIRTEENTH: That all of said labor was performed within the said Western District of New York.

WHEREFORE, the United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, demands judgment against the defendants in the sum of ~~Ten~~ hundred twelve dollars and eighty-seven cents (\$1012.87) with interest, from the 1st day of December, 1937, together with such other and

Praeipie for Appearance, Royal Indemnity Co.

further relief as the court may seem proper and the costs 25
and disbursements of this action.

2

EDWIN J. CULLIGAN,
Attorney for Plaintiff,
Office & P. O. Address,
928 Liberty Bank Bldg.,
Buffalo, New York.

(Verified.)

Endorsed:

Filed Aug. 24, 1938.

26

Praeipie for Appearance, Royal Indemnity Co.

(Name of Court and Title of Action.)

The Clerk will please enter our appearance as attorneys
for the defendant, Royal Indemnity Company, in the above
entitled action.

Dated Buffalo, N. Y., September 3, 1938.

GIBBONS, POTTLE & POTTLE, 27
Attorneys for defendant Royal
Indemnity Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed Sep. 3, 1938.

Answer of Defendant, Maryland Casualty Company.

28 **Praecipe for Appearance for Fleisher Engineering & Construction Co., Joseph A. Bass and Maryland Casualty Co.**

(Name of Court and Title of Action.)

The Clerk will please enter our appearance as attorneys for the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., and also for the Maryland Casualty Company.

Dated Buffalo, N. Y., May 13, 1938.

29

GIBBONS, POTTLE & POTTLE,
Attorneys for defendants Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., and Maryland Casualty Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed May 14, 1938.

30 **Answer of Defendant, Maryland Casualty Company.**

(Name of Court and Title of Action.)

The defendant, Maryland Casualty Company, by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE

1. The defendant, Maryland Casualty Company, admits the allegations stated in the paragraphs of the said com-

Answer of Defendant, Maryland Casualty Company.

plaint numbered respectively Second, Third, Fourth, Fifth and Sixth. 31

2. As to the matters alleged in that part or paragraph of the said complaint numbered First this defendant, Maryland Casualty Company, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh this defendant, Maryland Casualty Company, admits the execution of a bond of the general character described in said paragraph and that it contained the conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that it is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in such bond. 32 33

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Maryland Casualty Company, upon information and belief, denies that either it or the Royal Indemnity Company as sureties or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by the said Fleisher En-

Answer of Defendant, Maryland Casualty Company.

34 gineering & Construction Company and Joseph A. Bass, or
either of them, to any person or persons supplying either
labor or material in the prosecution of the work therein
described, and it also denies upon information and belief
that either it, or any other obligor, under the said bond has
broken any condition thereof. Except as herein denied this
defendant admits the truth of each and every other allega-
tion contained in the said Eighth paragraph of the said
complaint.

35 5. This defendant, Maryland Casualty Company, alleges
that it is without knowledge or information sufficient to
form a belief as to the truth of each and every averment
contained in those parts or paragraphs of the said com-
plaint numbered respectively Ninth, Tenth, Eleventh and
Thirteenth, and as to the aforesaid Ninth paragraph of the
said complaint, this defendant, upon information and be-
lief denies that any of the work or labor which the use
plaintiff alleges therein that he performed, was labor or
material supplied in the prosecution of the work provided
for in the contract in the said complaint referred to, or
any modification of the said contract at any time made, and
36 as to the aforesaid Eleventh paragraph of the said com-
plaint this defendant includes as a part of this paragraph
as if written herein the Third defense hereinafter set forth.

6. As to the matters alleged in that part or paragraph
of the said complaint numbered Twelfth, this defendant,
Maryland Casualty Company, denies that any demand has
been made upon it within the requirements of the bond in
such case made and provided for the payment of the
\$1012.87, or any part thereof.

Answer of Defendant, Maryland Casualty Company.

SECOND DEFENSE

37

1. The complaint fails to state a claim against this defendant, Maryland Casualty Company, upon which relief can be granted.

THIRD DEFENSE

1. That the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Company, or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection & Testing Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has any such notice been served in any manner in which the United States Marshal of the Western District of New York, is authorized by law to serve

Answer of Defendant, Royal Indemnity Company.

- 40 a summons, for which reasons the use plaintiff has no claim or demand against this defendant.

GIBBONS, POTTLE & POTTLE,
Attorneys for defendant Maryland
Casualty Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

- Frank Gibbons,
One of the Attorneys for the defendant
Maryland Casualty Company,
41 618-630 Walbridge Bldg.,
Buffalo, N. Y.

Verified.

Endorsed:

Filed, Sep. 10, 1938.

Answer of Defendant, Royal Indemnity Company.

(Name of Court and Title of Action.)

- 42 The defendant, Royal Indemnity Company, by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE.

1. The defendant, Royal Indemnity Company, admits the allegations stated in the paragraphs of the said complaint numbered respectively Second, Third, Fourth, Fifth and Sixth.

2. As to the matters alleged in that part or paragraph of the said complaint numbered First this defendant, Royal

Answer of Defendant, Royal Indemnity Company.

Indemnity Company, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.

43

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh this defendant, Royal Indemnity Company, admits the execution of a bond of the general character described in said paragraph and that it contained the conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that it is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in such bond.

44

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Royal Indemnity Company, upon information and belief, denies that either it or the Maryland Casualty Company as sureties or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by the said Fleisher Engineering & Construction Company and Joseph A. Bass, or either of them, to any person or persons supplying either labor or material in the prosecution of the work therein described, and it also denies upon information and belief that either it, or any other obligor, under the said bond has

45

Answer of Defendant, Royal Indemnity Company.

46 broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allegation contained in the said Eighth paragraph of the said complaint.

5. This defendant, Royal Indemnity Company, alleges that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh and Thirteenth, and as to the aforesaid Ninth paragraph of the
47 said complaint, this defendant, upon information and belief denies that any of the work or labor which the use plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said complaint, this defendant includes as a part of this paragraph as if written herein the Third Defense hereinafter set forth.

6. As to the matters alleged in that paragraph or part of the said complaint numbered Twelfth, this defendant,
48 Royal Indemnity Company, denies that any demand has been made upon it within the requirements of the bond in such case made and provided for the payment of the \$1012.-87, or any part thereof.

SECOND DEFENSE.

1. The complaint fails to state a claim against this defendant, Royal Indemnity Company, upon which relief can be granted.

Answer of Defendant, Royal Indemnity Company.

THIRD DEFENSE.

49

1. That the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Company, or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection & Testing Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid, in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has any such notice been served in any manner in which the United States Marshal of the Western District of New York, is authorized by law to serve a summons, for which reasons the use plaintiff has no claim or demand against this defendant.

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51

GIBBONS, POTTLE & POTTLE,
Attorneys for Defendant Royal
Indemnity Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Answer of Defendant, Fleisher Engineering & Construction Company.

52

Frank Gibbons,
One of the Attorneys for the Defendant
Royal Indemnity Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.
Verified.

Endorsed:

Filed Sept. 10, 1938.

53

Answer of Defendant, Fleisher Engineering & Construction Company.

(Name of Court and Title of Action.)

The defendant, Fleisher Engineering & Construction Co. by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE.

54 1. The defendant, Fleisher Engineering & Construction Co., admits the allegations stated in the paragraphs of the said complaint numbered respectively Second, Third, Fourth, Fifth and Sixth.

2. As to the matters alleged in that part or paragraph of the said complaint numbered First, this defendant, Fleisher Engineering & Construction Company, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.

Answer of Defendant, Fleisher Engineering & Construction Company.

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh, this defendant, Fleisher Engineering & Construction Company, admits the execution of a bond of the general character described in said paragraph and that it contained the same conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that it is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in said bond.

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Fleisher Engineering & Construction Co., upon information and belief, denies that either the Maryland Casualty Company or the Royal Indemnity Company, or both, as sureties, or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by this defendant, or Joseph A. Bass, doing business as Joseph A. Bass Co., or either or both of them, to any person or persons supplying either labor or material in the prosecution of the work therein described. It also denies upon information and belief that either it or any other obligor under said bond has broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allega-

Answer of Defendant, Fleisher Engineering & Construction Company.

58

tion contained in the said Eighth paragraph of the said complaint.

59

5. This defendant, Fleisher Engineering & Construction Co. alleges that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh, and Thirteenth, and as to the aforesaid Ninth paragraph of the said complaint, this defendant, upon information and belief denies that any of the work or labor which the use plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said complaint, this defendant includes as a part of this paragraph as if written herein the Third Defense hereinafter set forth.

60

6. As to the matters alleged in that part or paragraph of the said complaint numbered Twelfth, this defendant, Fleisher Engineering & Construction Co., denies that any demand has been made upon it within the requirements of the bond in such case made and provided for the payment of the sum of \$1012.87, or any part thereof.

SECOND DEFENSE.

1. The complaint fails to state a claim against this defendant, Fleisher Engineering & Construction Co., upon which relief can be granted.

Answer of Defendant, Fleisher Engineering & Construction Company.

THIRD DEFENSE.

61

1. That the use plaintiff, George S. Hallenbeck, doing business as Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Co. or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name of Hallenbeck Inspection and Testing Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid, in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has any such notice been served in any manner in which the United States Marshal of the Western District of New York is authorized by law to serve a summons, for which reasons the use plaintiff has no claim or demand against this defendant.

62

63

GIBBONS, POTTLE & POTTLE,
Attorneys for Defendant Fleisher
Engineering & Construction Co.,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Answer of Defendant, Bass.

61 Frank Gibbons,
 One of the Attorneys for the Defendant
 Fleisher Engineering & Construction Co.,
 618-630 Walbridge Bldg.,
 Buffalo, N. Y.

Verified.

Endorsed:

Filed Sept. 10, 1938.

65

Answer of Defendant, Bass.

(Name of Court and Title of Action.)

The defendant, Joseph A. Bass, doing business as Joseph A. Bass Co., by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE.

1. The defendant, Joseph A. Bass, admits the allegations stated in the paragraphs of the said complaint numbered respectively Second, Third, Fourth, Fifth and Sixth.
- 66 2. As to the matters alleged in that part or paragraph of the said complaint numbered First this defendant, Joseph A. Bass, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.
3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh, this defendant, Joseph A. Bass, admits the execution of a bond of the general character described in said paragraph and that

Answer of Defendant, Bass.

it contained the same conditions therein alleged, excepting 67
only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that he is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in such bond.

4. As to the allegations contained in that part or paragraph 68
of the said complaint numbered Eighth, this defendant, Joseph A. Bass, upon information and belief, denies that either the Maryland Casualty Company or the Royal Indemnity Company, or both, as sureties or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by this defendant, or the Fleisher Engineering & Construction Co., or either or both of them, to any person or persons supplying either labor or material in the prosecution of the work therein described. He also denies upon information and belief that either he or any other obligor under 69
said bond has broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allegation contained in the said Eighth paragraph of the said complaint.

5. This defendant, Joseph A. Bass, alleges that he is without knowledge or information sufficient to form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh and Thirteen,

Answer of Defendant, Bass.

70 and as to the aforesaid Ninth paragraph of the said complaint, this defendant, upon information and belief denies that any of the work or labor which the use plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said complaint, this defendant includes as a part of this paragraph as if written herein the Third Defense hereinafter set forth.

71 6. As to the matters alleged in that part or paragraph of the said complaint numbered Twelfth, this defendant, Joseph A. Bass, denies that any demand has been made upon him within the requirements of the bond in such case made and provided for the payment of the sum of \$1012.87, or any part thereof.

SECOND DEFENSE.

1. The complaint fails to state a claim against this defendant, Joseph A. Bass, upon which relief can be granted.

THIRD DEFENSE.

72 1. That the use plaintiff, George S. Hallenbeck, doing business as Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Co. or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name of Hallenbeck Inspection and Test-

Answer of Defendant, Bass.

ing Laboratory, alleges that it did or performed the last 73
of the labor or furnished or supplied the last of the material
for which the claim set forth in the complaint is made, and
that no written notice stating with substantial accuracy the
amount claimed, or the name of the party to whom the ma-
terial was furnished or supplied, or for whom the labor
was done or performed, has been served either by mail-
ing it by registered mail, postage prepaid, in an envelope
addressed to such contractors, or either of them, at any
place in which they, or either of them, maintained an office
or conducted his or its business, or his or its residence, 74
or elsewhere, nor has any such notice been served in any
manner in which the United States Marshal of the Western
District of New York is authorized by law to serve a sum-
mons, for which reasons the use plaintiff has no claim or de-
mand against this defendant.

GIBBONS, POTTLE & POTTLE,
Attorneys for Defendant, Joseph A. Bass,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Frank Gibbons,
One of the Attorneys for the
Defendant, Joseph A. Bass,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

75

(Verified.)

Endorsed:

Filed, Sept. 10, 1938.

Interrogatories Under Rule 33 of Rules of Civil Procedure.

76

(Name of Court and Title of Action.)

Sir:

YOU WILL PLEASE TAKE NOTICE that the defendants, Royal Indemnity Company and Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, pursuant to the provisions of Rule 33 of the Rules of Civil Procedure, demand that the following written interrogatories be answered by the use plaintiff, George S. Hallenbeck, to wit:

77

1. On what date did the plaintiff notify the defendant, Fleisher Engineering & Construction Company that Easthom Melvin Co. Inc. had failed and neglected to pay to the use plaintiff the sum of \$1012.87 referred to in the paragraph of the plaintiff's complaint herein numbered Eleventh.

2. On what date did the plaintiff notify the defendant, Joseph A. Bass, that Easthom Melvin Co. Inc. had failed and neglected to pay to the use plaintiff the sum of \$1012.87 referred to in the paragraph of the plaintiff's complaint herein numbered Eleventh.

78

3. Was the notice which may be specified in the answer to the foregoing interrogatory No. 1 oral or in writing?

4. Was the notice which may be specified in the answer to the foregoing interrogatory No. 2 oral or in writing?

5. If in answer to the foregoing interrogatory No. 3, it shall be stated that oral notice was given, then state the name and address of the individual who gave the notice for or on behalf of the plaintiff, and the name and address

Interrogatories Under Rule 33 of Rules of Civil Procedure.

of the individual to whom the notice was given on behalf of the defendant, Fleisher Engineering & Construction Co., and then state in substance what was said. 79

6. If in answer to the foregoing interrogatory No. 4 it shall be stated that oral notice was given, then state the name and address of the individual who gave the notice for or on behalf of the plaintiff, and the name and address of the individual to whom the notice was given on behalf of the defendant, Joseph A. Bass, and then state in substance what was said.

7. If in answer to the foregoing interrogatory No. 3 it shall be stated that the notice was in writing, then set forth in full a true and correct copy of the said written notice and specify the date on which it was received, and how it was received, that is whether it was delivered to the said defendant, Fleisher Engineering & Construction Co. personally or by mail; if personally state the time and place of delivery, the name of the person by whom it was delivered, the name and address of the person to whom it was delivered; if by mail set forth a statement which shall show when and where the same was deposited in the post-office, to whom and at what address the same was mailed, and whether the same was sent by ordinary mail or by registered mail. 80 81

8. If in answer to the foregoing interrogatory No. 4 it shall be stated that the notice was in writing, then set forth in full a true and correct copy of the said written notice and specify the date on which it was received, and how it was received, that is whether it was delivered to the said defendant, Joseph A. Bass, personally or by mail; if personally

Interrogatories Under Rule 33 of Rules of Civil Procedure.

- 82 state the time and place of delivery, the name of the person by whom it was delivered, the name and address of the person to whom it was delivered; if by mail set forth a statement which shall show when and where the same was deposited in the postoffice, to whom and at what address the same was mailed and whether the same was sent by ordinary mail or by registered mail.
- 83 9. Have you any registry receipts from the United States Postoffice showing the delivery of any written documents, letter, or other communication which may have been referred to you in your answers to any of the preceding interrogatories? If your answer be in the affirmative please attach the same to your deposition and state that you have done so, or set forth a true and correct copy thereof.

Dated Buffalo, N. Y., December 8th, 1938.

Yours, etc.,

84

GIBBONS, POTTLE & POTTLE,
Attorneys for the defendants Fleisher
Engineering & Construction Co. *et al.*,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

To:

Edwin J. Culligan, Esq.,
Attorney for Plaintiff.

Endorsed:

Filed Dec. 10, 1938.

Answers to Interrogatories.

(Name of Court and Title of Action.)

85

The above named plaintiff, for its written interrogatories, pursuant to defendants' demand, hereby answers same in the following manner:

1. Plaintiff notified the defendant, Fleisher Engineering & Construction Co. on June 3, 1937.

2. Plaintiff did not send a separate notice to Joseph A. Bass, but alleges that the above notice to Fleisher Engineering & Construction Co. was also notice to Joseph A. Bass.

3. That notice was in writing.

86

4. Same notice.

7. A copy of the notice is attached hereto. It was delivered by mail and, to best of plaintiff's information and belief, same was received at the office of Fleisher Engineering & Construction Co., 233 Langfield Drive, Buffalo, N. Y., either on June 3, 1937, or June 4, 1937. It was sent by ordinary mail and was deposited in a United States Post Office box in the vicinity of 56 Pearl St., Buffalo, N. Y., on June 3, 1937, addressed to the said Langfield Drive address.

8. It is claimed that the same notice operated as notice to Joseph A. Bass.

87

9. No.

EDWIN J. CULLIGAN,
Attorney for Plaintiff,
Office & P. O. Address,
928 Liberty Bank Bldg.,
Buffalo, N. Y.

Answers to Interrogatories.

88 To:

Gibbons, Pottle & Pottle,
 Attorneys for the defendants Fleisher En-
 gineering & Construction Co., *et al.*,
 Office & P. O. Address,
 618-630 Walbridge Bldg.,
 Buffalo, N. Y.

Verified.

Endorsed:

Filed Jan. 28, 1939.

89

COPY

Docket H-6703 (ERA) NY (S)
 June 3rd, 1937 860.1

Re:—Kenfield Housing Project
 Payment of Accounts
 Easthom-Melvin, Sub-Contractor

C. Leslie Weir, Project Engineer,
 Langfield Drive,
 Buffalo, N. Y.

90

Dear Sir:

We list below invoices of March, April and May cov-
 ering inspection and testing work on the Kenfield Housing
 Project, for which we are unable to secure payment.

March—Invoice #310	\$ 541.65
April —Invoice #407	442.37
May —Invoice #509	28.85

 \$1012.87

Defendants' Notice of Motion for Summary Judgment.

The Easthom-Melvin Co., have referred us to the Maryland Casualty Co., for payment of these accounts. 91

Our contract agreement with Easthom-Melvin gives the usual trade discount of 2%—10 days or 30 days net.

The Maryland Casualty Co., local office advises that they have taken the matter of payment up with the home office but to date have been unable to get instructions to pay.

As these invoices chiefly cover labor, payment should be made promptly. We would appreciate any assistance you may be able to give to the end that we will be paid promptly for this work. 92

Very truly yours,

HALLENBECK INSPECTION & TESTING
LABORATORY

GEO. S. HALLENBECK,
President

GSH:LW

CC: Fleisher Engr. & Constr. Co.

Defendants' Notice of Motion for Summary Judgment. 93

(Name of Court and Title of Action.)

SIR:

YOU WILL PLEASE TAKE NOTICE that upon the summons and complaint in this action and the separate answers of the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, and upon the interroga-

Defendants' Notice of Motion for Summary Judgment.

- 94 tories on behalf of the said defendants, which were served upon you on the 9th day of December, 1938, and upon the answers to such interrogatories served upon the attorneys for the said defendants on January 28, 1939, a motion will be made at a Stated Term of the United States District Court, for the Western District of New York, appointed to be held at the United States Court House, Niagara Square, Buffalo, N. Y., on the 14th day of February, 1939, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a summary judgment in favor of the defendants and against the plaintiff, which shall dismiss the complaint in this action, and award the defendants, and each of them, a judgment of no cause of action by reason of the facts that the pleadings, interrogatories and answers thereto show that there is no genuine issue as to any material fact and that the said defendants are entitled to a judgment as above stated as a matter of law, and also for such other and further or different relief in the premises as to the court may seem just and equitable.
- 95

Dated Buffalo, N. Y., January 30th, 1939.

Yours, etc.,

96

FRANK GIBBONS,

One of the Attorneys for the Defendants,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

To

Edwin J. Culligan, Esq.,
Attorney for the Plaintiff.

Endorsed:

Filed Feby. 2, 1939.

**Order Denying Defendants' Motion for Summary
Judgment, Captioned at March, 1939, Stated
Term, March 1, 1939.**

97

(Name of Court and Title of Action.)

Motion on behalf of the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, pursuant to Rule 56 of the Rules of Civil Procedure, for a summary judgment in favor of the defendants and against the plaintiff.

Appearances: Frank Gibbons, Esq., of counsel for the moving parties on behalf of the motion.

98

Edwin J. Culligan, Esq., counsel for the plaintiff, in opposition to motion.

Papers read and filed by moving parties in support of motion: Complaint in the action, separate answers of the defendants, Fleisher Engineering & Construction Company, Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, interrogatories and the answers thereto.

The motion having come on to be heard on the 14th day of February, 1939, and due deliberation having been had thereon,

99

NOW, upon motion of Edwin J. Culligan, Esq., attorney for the plaintiff, it is

ORDERED that said motion for summary judgment be and the same is hereby denied.

JOHN KNIGHT,
U. S. District Judge.

Endorsed:

Filed March 3, 1939.

Opinion of Knight, D. J., in This Action.

(Name of Court and Title of Action.)

100

KNIGHT, District Judge:

This is a motion for summary judgment in a suit brought under the provisions of section 270 (a), (b), and (c) of USCA. The questions presented in U. S. for the use of J. H. Welch Co., Inc. v. Fleisher Engineering & Construction Co., Inc., decided herewith, are raised. What was said in that case with reference to the service of notice by registered mail is applicable here. Service was there, as it is here held to be sufficient.

101

On the question of the claim a slightly different question is involved. The so-called notice is directed to the Project Engineer, but service of a copy of the notice was made upon the Fleisher Engineering & Construction Company. The particulars of the claim are sufficient to meet the requirements of the statute, and it is thought that the effect is the same as though the claim were directed to Fleisher Engineering & Construction Company. The latter company, the contractor, was fully informed of the alleged liability.

The motion is denied.

February 27, 1939.

102

JOHN KNIGHT,
United States District Judge.

Endorsed:

Filed Feb. 27, 1939.

Opinion of Knight, D. J., Rendered in Action Entitled:

UNITED STATES OF AMERICA
for the use and benefit of J. H.
WELCH COMPANY, INC.,

Plaintiff,

v.

FLEISHER ENGINEERING &
CONSTRUCTION CO., *et al.*,
Defendants.

Law 2193 A.

103

(Name of Court and Title of Action.)

KNIGHT, District Judge:

104

The defendants, Fleisher Engineering & Construction Company and Joseph A. Bass, were contractors for the construction of a government structure known as Kenfield Housing Project No. H-6703, at Buffalo, N. Y. Easthom-Melvin Company, Inc. were sub-contractors on such structure, and the J. H. Welch Company, Inc., with the consent of the defendants, Fleisher and Bass, furnished certain work, labor and materials to Easthom-Melvin Company, Inc. Easthom-Melvin Company, Inc. failed to pay for these, and this suit is brought under the provisions of the so-called Miller Act, Chapter 642, Laws 1935, Title 40 USCA section 270 a, b, c, and d. Defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, move for a summary judgment dismissing the complaint upon the ground that there is no issue as to any material fact presented.

105

Defendants contend that the notice of claim was not served as required by the said Act and that the claim is insufficiently described in said notice. The statute, section

Opinion of Knight, D. J., in This Action.

- 106 270 b (a), provides that the notice precedent to the right to sue shall be served either by mailing by registered mail or as the United States Marshal is authorized to serve summons. The complaint alleges service of notice and the interrogatories show service was made by unregistered mail. The notice itself consists of a letter directed to Fleisher Engineering & Construction Company under the subject noted "Easthom-Melvin Co., Kenfield Housing Project" and referred to an invoice enclosed therewith. This invoice shows the amount claimed, materials furnished and persons to whom furnished. The statute provides that notice shall show "with substantial accuracy the amount claimed, name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."
- 107

Sections 270 a, b, c, and d, *supra*, replace old section 270, known as the Hurd Act.

- 108 The old statute contained no provision for the service of any notice of claim on the contractor prior to suit. What has been said by the courts in regard to it, however, is to be considered in construing the present Act. "The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. * * * The purpose of the Materialmen's Act, which is highly remedial and must be construed liberally, is to provide security for the payment of all persons who supply labor or material in a public work, * * *." *Fleischmann Co. v. United States*, 270 U. S. 349. "Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the

Opinion of Knight, D. J., in This Action.

act. * * * Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." (Citing numerous cases.) *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376. "The act is intended to be high remedial. Its purpose is simple and beneficial. It is to give a remedy to material men and laborers on the bond of the original contractor and a reasonable time to enforce it, and in a single proceeding to unite all claimants." *A. Bryant v. N. Y. Steam Fitting Co.*, 235 U. S. 327, p. 337. This case is especially in point. It involved the construction of the provision in Section 270, *supra*, which states that the creditor instituting suit shall give personal notice of its pendency and also notice by publication, the last publication to be at least three months before the expiration of the time in which to bring suit. The court there held that publication which expired 23 days prior to the suit limitation period was sufficient; that this provision was directory and that the right to institute suit was not affected.

"Statutes are not to be so literally construed as to defeat the purpose of the legislature." *Hill v. American Surety Co.*, 200 U. S. 197; see also *United States v. Freeman*, 44 U. S. 556. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew v. United States*, 144 U. S. 47. "The statute in question and the proceedings under it are such as to offer great opportunity for such objections, which, if favorably regarded, might often be invoked to defeat substantial justice. In order to prevent this, the Supreme Court has recognized the necessity of a broad and liberal construction

Opinion of Knight, D. J.; in This Action.

112 of the Act * * *." U. S. for use of McNulty Bros. v. Noel Const. Co., *et al.*, 1 F. (2d) 446. United States v. James Mills & Sons Co., 55 F. (2d) 249, like A. Bryant v. N. Y. Steam Fitting Co., *supra*, held that the failure to publish the notice did not defeat the right to sue.

113 Construing this statute, 270 b (a) in the spirit approved by the Supreme Court, it seems to me it must be held that the service by unregistered mail was sufficient. It is presumed that the contractor received the notice. He had the same opportunity to notify the surety as he otherwise would have had. The surety was not prejudiced. The evident purpose of requiring registration was to insure delivery.

114 It is not seen that any of the cases cited by the defendants is determinative of the issues. In United States v. Boomer, 183 F. 726, it was held that the limitation period was not extended by virtue of a state statute. Merchants National Bank v. United States, 214 F. 200, seems to have been reversed by A. Bryant v. N. Y. Steam Fitting Co., *supra*. Belnap Hardware & Mfg. Co. v. Ohio Public C. Co., 264 F. 676, held that a creditor may not sue until after the expiration of the period fixed for suit by the United States. In Antrim v. Hannon, 18 F. (2d) 548, it was held that the final settlement or determination commences the tolling of the statute. Illinois Surety Co. v. John Davis Co., 244 U. S. 376, hereinbefore cited, seems opposed to the view expressed on behalf of the defendant. Generally these cases relate to the period of limitation fixed by law.

Attention is called to the case of Breedlove v. General Baking Co., 138 Kan. 143 (1933) and to certain language of the opinion seemingly directly in point. It was said: "The fact that the statute prescribes the delivery of the

Opinion of Knight, D. J., in This Action.

written claim by registered mail * * * might very properly
 and fairly come under the very general rule that it was the
 intention of the legislature to exclude all other ways of do- 115
 ing it by mail. * * * The legislature in using these terms
 certainly meant something more formal than what might
 happen to come to an employer by mail and, therefore, with
 an apparently good reason for making a distinction limited
 such service so far as being done by mail to registered
 mail." In that case, however, no proof was made as to
 the address of the employer on the envelop enclosing the
 notice. The court held that such proof was necessary to
 give rise to the presumption of delivery and held for de- 116
 fendant employer, because plaintiff's case was based on
 presumption of delivery, rather than upon service or ad-
 mission. But the court noted the citation of three Kansas
 cases arising under the same statute; *Weaver v. Shanklin*
Walnut Co., 131 Kan. 771; *Eckl v. Sinclair Refining Co.*,
 133 Kan. 285; and *Honn v. Elliott et al.*, 132 Kan. 454, in
 each of which it was held that service other than by regis-
 tered mail was sufficient. These cases indicate that where
 actual receipt of the notice was proved or admitted, deliv-
 ery by nonregistered mail was sufficient service of the no-
 tice despite the limitation of the statute. In the instant 117
 case it is to be presumed for the purposes of this motion
 that the contractor actually received the notice.

A question has been raised as to the sufficiency of the
 service upon the Fleisher Engineering & Construction
 Company alone and not upon Joseph A. Bass. As these
 were joint contractors, service upon either was sufficient.
 As to the sufficiency of the claim, it is to be said that the
 same meets fully every requirement of the statute.

Plaintiff's Notice of Motion for Summary Judgment.

118 The motion for summary judgment is denied.
February 27, 1939.

JOHN KNIGHT,
United States District Judge.

Endorsed:

Filed Feb. 27, 1939.

Plaintiff's Notice of Motion for Summary Judgment.

(Name of Court and Title of Action.)

119 Sirs:

YOU WILL PLEASE TAKE NOTICE that upon the summons and complaint in this action and the separate answers of the defendant, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, and upon the interrogatories and the replies thereto served in this action and filed in the office of the clerk of this Court, and upon the Order duly granted by this Court on March 1, 1939, denying the motion for summary judgment made on behalf of the defendants, and upon all the proceedings had thereon, and upon the affidavit of George S. Hallenbeck, verified the 17th day of April, 1939, a motion will be made at a Stated Term of the United States District Court for the Western District of New York, to be held in the United States Court House, Niagara Square, Buffalo, N. Y., on the 1st day of May, 1939, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a summary judgment in favor of the plaintiff and against the defendants, which shall strike out the Answers interposed by the defendants in this action and award to the plaintiff the relief demanded in the complaint against the defendants,

120

Affidavit of George S. Hallenbeck on Motion.

Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company, together with such other or further relief, or such other Order, as to the Court may seem proper. 121

Dated: April 14th, 1939.

Yours, etc.,

EDWIN J. CULLIGAN,
Attorney for Plaintiff,
Office & P. O. Address,
928 Liberty Bank Bldg., 122
Buffalo, N. Y.

To:

Gibbons, Pottle & Pottle,
Attorneys for Defendants,
Office & P. O. Address,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed April 20, 1939.

123

Affidavit of George S. Hallenbeck on Motion.

(Name of Court and Title of Action and Venue.)

GEORGE S. HALLENBECK, being duly sworn, deposes and says that he now is, and was at all the times hereinafter mentioned, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, with offices at 56 Pearl St. in the City of Buffalo, County of Erie and State of New York.

Affidavit of George S. Hallenbeck on Motion.

124 That this action is brought to recover the sum of One thousand twelve dollars and eighty-seven cents (\$1012.87) with interest from the 1st day of December, 1937, by reason of the fact that during the months of March, April and May, 1937, he performed certain work and labor in the inspection and testing of materials on the Kenfield Housing Project under an agreement with the Easthom Melvin Co., Inc.; that he was to be paid the sum of \$1012.87 for such services, the terms of payment—not cash, 2% 10th *proximo*.

125 That the said labor performed and the agreed price and reasonable value of said labor, and the time of performance, is more fully set out on the copies of the invoices attached hereto and made a part of this affidavit.

126 That the said Easthom Melvin Co., Inc. were subcontractors of the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., and the labor performed by George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, was part of the labor required to be performed by the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., under their contract with the United States Government for the construction of the superstructure for Kenfield Housing Project, No. H-6703, in Buffalo, N. Y.

Your deponent has in his possession a certified copy of the contract between the United States of America and the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., which he will present to the Court upon the hearing of the motion to which this affidavit is directed.

Affidavit of George S. Hallenbeck on Motion.

Your deponent has, also, in his possession, a certified copy of a bond issued by the Royal Indemnity Company in which bond the said Royal Indemnity Company, as surety, and the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., as principal, bound themselves, jointly and severally, in the amount of \$359,946.00 and the said contractors, as principal, and the defendant, Maryland Casualty Company, as surety, bound themselves, jointly and severally, in the amount of \$79,988.00, conditioned, among other things, as follows: 127

“If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.” 128

That your deponent will beg leave to submit said certified copy of the bond to the Court upon the hearing of the motion to which this affidavit is directed.

That on or about the 3rd day of June, 1937, the plaintiff wrote to Mr. C. Leslie Weir, who was the project engineer representing the government, in charge of said project, as per copy of letter hereto attached and made a part of this affidavit. 129

That the plaintiff also mailed a copy of said letter to the defendant, Fleisher Engineering & Construction Co., by depositing said copy in a Post Office box maintained by

Affidavit of George S. Hallenbeck on Motion.

130 the United States Government as a receptacle for mail in the vicinity of plaintiff's office on Pearl Street in the City of Buffalo, N. Y., on the 3rd day of June, 1937, which notice was addressed, in a postpaid wrapper, to the said defendant, Fleisher Engineering & Construction Co. at Langfield Drive, Buffalo, N. Y., and your deponent, on or about the 5th day of June, 1937, received a reply from Mr. C. Leslie Weir, as per copy of letter attached and made a part hereof.

That no part of the said sum of \$1012.87 and interest has ever been paid to the plaintiff.

131 This plaintiff has been informed by his counsel that under date of March 1, 1939, this Court granted an order determining that said method of service was sufficient under the provisions of the Miller Act and your deponent verily believes that there is no defense to this action.

WHEREFORE, deponent prays that defendants' Answer be stricken out and judgment directed to be entered thereon in favor of the plaintiff for the said sum of \$1012.87, with interest from the 1st day of December, 1937, and the costs of this action and of this motion.

132

GEO. S. HALLENBECK.

Sworn to before me this

17th day of April, 1939.

Edwin J. Culligan,

Notary Public, Erie County.

Endorsed:

Filed April 20, 1939.

Affidavit of George S. Hallenbeck on Motion.

**HALLENBECK INSPECTION AND TESTING
LABORATORY**

133

Francis Building
56-62 Pearl St.
Buffalo, N. Y.

Date: March 31st, 1937

Invoice No. 310

Easthom-Melvin Co.,
Langfield Drive,
Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

134

To testing materials for Kenfield Housing
Project, Docket H-6703 (ERA) N. Y.
6" x 12" CONCRETE CYLINDERS

<i>Date</i>	<i>Lab. No.</i>	<i>Test No.</i>	<i>Age</i>
3/2	13673	259A & 259B	7 days
3/3	13676	260A & 260B	7 "
3/4	13677	261A & 261B	7 "
3/5	13689	262A & 262B	7 "
3/8	13695	264A & 264B	7 "
3/9	13701	265A & 265B	7 "
3/10	13702	266A & 266B	7 "
3/11	13703	267A & 267B	7 "
3/12	13710	268A & 268B	7 "
3/15	13713	270A & 270B	7 "
3/16	13721	271A & 271B	7 "
3/17	13722	272A & 272B	7 "
3/18	13727	273A & 273B	7 "
3/19	13732	274A & 274B	7 "
3/20	13733	275A & 275B	7 "
3/22	13742	276A & 276B	7 "

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Affidavit of George S. Hallenbeck on Motion.

136	Date	Lab. No.	Test No.	Age
	3/22	13745	279A	5 days
	3/23	13743	277A & 277B	7 "
	3/24	13744	278A & 278B	7 "
	3/24	13745	279B	7 "
	3/25	13751	280A & 280B	7 "
	3/26	13754	281A & 281B	7 "
	3/29	13757	282A & 282B	7 "
	3/30	13761	283A & 283B	7 "
	3/31	13763	284A & 284B	7 "
	48 tests @ \$1.40 each\$72.00			
137	24 cylinder molds filled but not tested			
	24 molds @ 10¢ each 2.40			

See Sheet No. 2

HALLENBECK INSPECTION AND TESTING
LABORATORY

Francis Building
56-62 Pearl St.
Buffalo, N. Y.

138

Date: March 31st, 1937

Invoice No. 310

Sheet No. 2
Easthom-Melvin Co.,
Langfield Drive,
Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

Portland Cement

Date	Lab. No.	Carrier	Bbls.	Brand
3/4	13032	Truck	750	Federal
3/11	"	"	500	"

Affidavit of George S. Hallenbeck on Motion.

<i>Date</i>	<i>Lab. No.</i>	<i>Carrier</i>	<i>Bbls.</i>	<i>Brand</i>	
3/18	13032	Truck	500	Federal	139
3/25	"	"	550	"	
3/31	"	"	465	"	

2765 @ 2¢ per Bbl. \$55.30

Concrete Specimens

<i>Date</i>	<i>Lab No.</i>	<i>Sample Mark</i>		
3/23	13756	Block #5, Building #1		
		1 Specimen @ \$2.75.....	2.75	
		Time of Inspector W. Hallenbeck at Building Site for month of March 25 days time @ \$8.50 per day	212.50	140
		Time of Inspectors Thos. F. Joyce & E. S. Pittaway at Mixing Plant of Genesee Sand & Gravel Co., for Month of March, 1937—26 days time @ \$7.75 per day	201.50	
			<hr/> \$546.45	
			4.80	141
			<hr/> \$541.65	

Affidavit of George S. Hallenbeck on Motion.

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**HALLENBECK INSPECTION AND TESTING
LABORATORY**

Francis Building

56-62 Pearl St.

Buffalo, N. Y.

Date: April 30, 1937

Invoice No. 407

Sheet 2

Easthom-Melvin Co.,

Langfield Drive,

143 Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

Portland Cement

<i>Date</i>	<i>Lab. No.</i>	<i>Carrier</i>	<i>Bbls.</i>	<i>Brand</i>
4/8	13032	Truck	100	Federal
4/16	"	"	523	"
4/22	"	"	430	"
4/29	"	"	183	"

144

1236 @ 2¢ per bbl. \$24.72

Time of Inspector—W. Hallenbeck at building site for
Month of April, 1937

22 days @ \$8.50 per day 187.00

Time of Inspector—Edwin
Pittaway at Plant of Genesee
Sand & Gravel Co.,

24 days @ \$7.75 per day 186.00

\$442.37

Affidavit of George S. Hallenbeck on Motion.

**HALLENBECK INSPECTION AND TESTING
LABORATORY**

145

Francis Building
56-62 Pearl St.
Buffalo, N. Y.

Date: April 30, 1937
Invoice No. 407

Sheet No. 1

Easthom-Melvin Co.,
Langfield Drive
Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

146

To testing materials for Kenfield Housing
Project, Docket H-6703 (ERA) N. Y. (S)
6" x 12" Concrete Cylinders

<i>Date</i>	<i>Lab. No.</i>	<i>Test No.</i>	<i>Age</i>
4/1	13765	285A & 285B	7 days
4/2	13775	286A & 286B	7 "
4/5	13778	287A & 287B	7 "
4/6	13779	288A & 288B	7 "
4/7	13781	289A & 289B	7 "
4/8	13786	290A & 290B	7 "
4/9	13792	291A & 291B	7 "
4/16	13822	293A & 293B	7 "
4/19	13757	282C	28 "
	13831	294A & 294B	7 "
4/20	13832	295A & 295B	7 "
4/21	13838	296A & 296B	7 "
4/26	13849	297A & 297B	7 "
4/27	13855	298A & 298B	7 "
4/28	13863	299A & 299B	7 "

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Affidavit of George S. Hallenbeck on Motion.

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29 Tests @ \$1.40 each\$40.60
 13 Cylinders not tested @ 10¢
 each 1.30

Job Secured Blocks

Date *Lab. No.* *Location—Secured from Block 11, Bldg. 5*
 4/6 13796 Size—4" x 4" x 2½" High2.75

See Sheet No. 2

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HALLENBECK INSPECTION AND TESTING LABORATORY

Francis Building
 56-62 Pearl St.,
 BUFFALO, N. Y.

Date: May 10th, 1937
 Invoice No. 509

Easthom-Melvin Co.,
 233 Langfield Drive,
 Buffalo, N. Y.

TERMS: NET CASH

2% — 10 days

150

To Testing Materials for Kenfield
 Housing Project, Docket H-6703
 (ERA) NY (S) 6" x 12" Concrete
 Cylinders

Date	Lab. No.	Test No.	Age
5/3	13876	300A & 300B	7 Days
5/4	13877	301A & 301B	7 "

4 tests @ \$1.40 each\$ 5.60

Time of Inspector at Plant of
 Genesee Sand & Gravel Co.,
 E. S. Pittaway—

Affidavit of George S. Hallenbeck on Motion.

May 3, 4 & 5th		151
3 days @ \$7.75 per day	23.25	
	<hr/>	
	\$28.85	

FINAL BILL

Docket H-6703 (ERA) NY (S)
June 3rd, 1937.

<i>Re:—Kenfield Housing Project</i>	860.1
Payment of Accounts	
Easthom-Melvin, Sub-Contractor	152

C. Leslie Weir, Project Engineer,
Langfield Drive,
Buffalo, N. Y.

Dear Sir:

We list below invoices of March, April and May covering inspection and testing work on the Kenfield Housing Project, for which we are unable to secure payment.

March—Invoice #310	\$ 541.65	
April —Invoice #407	442.37	153
May —Invoice #509	28.85	
	<hr/>	
	\$1012.87	

The Easthom-Melvin Co., have referred us to the Maryland Casualty Co., for payment of these accounts.

Our contract agreement with Easthom-Melvin gives the usual trade discount of 2%—10 days or 30 days net.

The Maryland Casualty Co., local office advises that they have taken the matter of payment up with the home office but to date have been unable to get instructions to pay.

Affidavit of George S. Hallenbeck on Motion.

- 154 As these invoices chiefly cover labor, payment should be made promptly. We would appreciate any assistance you may be able to give to the end that we will be paid promptly for this work.

Very truly yours,

HALLENBECK INSPECTION & TESTING
LABORATORY

Geo. S. Hallenbeck, President.

GSH:LW

CC: Fleisher Engr. & Constr. Co.

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FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

215 Langfield Drive
Buffalo, New York

June 5, 1937

In Reply Please Refer to
Inspection: CLW; ds
Docket H-6703 (ERA) NY(S)
Kenfield Housing

- 156 Hallenbeck Inspection & Testing Laboratory,
56 Pearl Street,
Buffalo, N. Y.

Gentlemen:

This will acknowledge your communication of June 3rd, containing a complaint on account of non-payment to you for services rendered to the Easthom-Melvin Company, a subcontractor of the Fleisher Engineering & Construction Company on the above project.

*Order Directing Judgment Appealed From Captioned
at March 1939, Stated Term, Dated May 1, 1939.*

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We will take this matter up with the General Contractor and will advise you further.

Most sincerely yours,

(SIGNED) C. LESLIE WEIR
Project Engineer

3 cc Wash.

1 cc file

**Order Directing Judgment Appealed From Captioned
at March 1939, Stated Term, Dated May 1, 1939.**

158

(Name of Court and Title of Action.)

Motion on behalf of the plaintiff, United States of America, for the use and benefit of George S. Hallenbeck doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, pursuant to Rule 56 of the Rules of Civil Procedure for a summary judgment in favor of the plaintiff and against the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the relief demanded in the complaint in this action.

159

Appearances: Edwin J. Culligan, Esq., counsel for the plaintiff, in support of said motion.

Frank Gibbons, Esq., counsel for the defendants in opposition to said motion.

Papers read and filed by moving parties in support of motion: Complaint in the action; separate answers of the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co.,

*Order Directing Judgment Appealed From Captioned
at March 1939, Stated Term, Dated May 1, 1939.*

160

Royal Indemnity Company and Maryland Casualty Company; Interrogatories served upon the attorney for the plaintiff on the 8th day of December, 1938, filed in the office of the Clerk of this Court on the 9th day of December, 1938; Replies to said Interrogatories duly filed in the office of the Clerk of this Court; Notice of Motion made by the said defendants for a Summary Judgment under Rule 56 of the Rules of Civil Procedure and all documents submitted by the said defendants in support of said motion; Order duly granted by this Court on the 1st day of March, 1939, denying the said Motion for Summary Judgment made on behalf of said defendants; Notice of Motion for Summary Judgment in behalf of plaintiff and against the said defendants; the Affidavit of George S. Hallenbeck, verified the 17th day of March, 1939.

161

The motion having come on to be heard on the 1st day of May, 1939, and due deliberation having been had thereon,

NOW, upon motion of EDWIN J. CULLIGAN, ESQ., attorney for the plaintiff, it is

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ORDERED that judgment be entered herein in favor of the above named plaintiff and against the above named defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the sum of Ten hundred twelve dollars and eighty-seven cents (\$1012.87), with interest thereon from the 1st day of December, 1937, together with the costs and disbursements of this action.

JOHN KNIGHT,
U. S. District Judge.

Endorsed:

Filed Jun. 9, 1939.

Judgment Appealed From.

(Name of Court and Title of Action.)

163

The plaintiff in the above entitled action, having duly moved this Court, pursuant to Rule 56 of the Rules of Civil Procedure, for a summary judgment in favor of the plaintiff and against the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the relief demanded in the complaint in this action, and said Court having made an order that judgment be entered herein in favor of the above named plaintiff and against the above named defendants for the relief demanded in said complaint,

164

NOW, on motion of Edwin J. Culligan, attorney for said plaintiff, it is

ADJUDGED that the said plaintiff recover judgment against the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the sum of Ten hundred twelve dollars and eighty-seven cents (\$1012.87), with interest thereon from the 1st day of December, 1937, in the sum of Ninety dollars and sixteen cents (\$90.16), together with the costs and disbursements of this action as taxed, in the sum of Twenty-seven dollars and fifty cents (\$27.50), amounting in all to the sum of Eleven hundred thirty dollars and fifty-three cents (\$1130.53), and have execution therefor.

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JUDGMENT signed this 9th day of June, 1939.

MAY C. SICKMON,
Clerk of the Court.

Endorsed -

Filed June 9, 1939.

Assignment of Errors.

(Name of Court and Title of Action.)

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And now on this 13th day of June, 1939, came the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, by Gibbons, Pottle & Pottle, their attorneys, and say that the final judgment entered in the above cause on the 9th day of June, 1939, is erroneous and unjust to the said defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company;

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FIRST: Because in the order dated March 1, 1939, and entered in the office of the Clerk of the United States District Court, for the Western District of New York, on the 3rd day of March, 1939, the court denied the motion of the said defendants for a summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, whereas the said motion should have been granted and a summary judgment should have been rendered in favor of the said defendants and against the plaintiff, dismissing the action with costs.

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SECOND: Because in the order dated May 1, 1939 and entered in the office of the Clerk of the United States District Court for the Western District of New York, on the 9th day of June, 1939 the court granted the motion of the plaintiff for a summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, and directed a judgment in favor of the plaintiff, and against the above named defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, doing business as Joseph A. Bass Co., in the sum of \$1012.87, whereas the said motion should have been denied.

Assignment of Errors.

THIRD: Because the court erred in entering final judgment in this action in favor of the United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, and against the defendants, Fleisher Engineering & Construction Company, Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, for the sum of \$1103.03 damages and \$27.50 costs, amounting in all to \$1130.53, in that the law and the facts are not sufficient to sustain such judgment against the said defendants, whereas it should have adjudged and directed that the complaint in this action be dismissed as to each and all of the said defendants. 169 170

WHEREFORE the defendants, Fleisher Engineering & Construction Company, Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, pray that the said judgment hereinbefore mentioned be reversed and that a new trial be ordered, or that the United States Circuit Court of Appeals for the Second Circuit render a proper judgment on the record. 171

Dated, Buffalo, N. Y. June 13, 1939.

FRANK GIBBONS,
One of the Attorneys for the Defendants,
Fleisher Engineering & Construction
Company, Joseph A. Bass,
Royal Indemnity Company and
Maryland Casualty Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed June 13, 1939.

Supersedeas Bond.

(Name of Court and Title of Action.)

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KNOW ALL MEN by these presents that the United States Fidelity & Guaranty Company, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business in the City of Baltimore, State of Maryland, and duly authorized to carry on a general casualty insurance business within the State of New York, and in the courts of the United States, is held and firmly bound unto United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, in the full and just sum of two thousand two hundred sixty-five dollars (\$2265.00) to be paid to the said plaintiff, United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, its attorneys, administrators, executors, successors, or assigns, to which payment well and truly to be made it binds itself, its successors and assigns firmly by these presents.

173

Signed and sealed this 12th day of June, 1939.

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WHEREAS lately at a Stated Term of the United States District Court for the Western District of New York in the suit pending in the said court between United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, as plaintiff, and Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company, et al., in a civil

Supersedeas Bond.

action No. 2193-A, final judgment was rendered in 175
favor of the said plaintiff, United States of America, for
the use and benefit of George S. Hallenbeck, doing business
under the assumed name and style of Hallenbeck Inspecting
& Testing Laboratories, and against the defendants, Fleish-
er Engineering & Construction Co., Joseph A. Bass, doing
business as Joseph A. Bass Co., Royal Indemnity Company,
and Maryland Casualty Company, et al., to the effect that
the said plaintiff recover a judgment against the said de-
fendants Royal Indemnity Company, Maryland Casualty
Company, Fleisher Engineering & Construction Co., and
Joseph A. Bass doing business as Joseph A. Bass Co., for 176
the sum of one thousand one hundred and three dollars and
three cents (\$1103.03) damages and interest, together with
twenty-seven dollars and fifty cents (\$27.50) costs, amount-
ing in all to the sum of one thousand one hundred thirty
dollars and fifty-three cents (\$1130.53);

Now the condition of the above obligation is such that
if the said appellants, Royal Indemnity Company, Mary-
land Casualty Company, Fleisher Engineering & Construc-
tion Co., and Joseph A. Bass, doing business as Joseph A.
Bass Co., shall prosecute their appeal to effect and answer
to the plaintiff, United States of America, for the use and
benefit of George S. Hallenbeck, doing business under the
assumed name and style of Hallenbeck Inspecting & Test-
ing Laboratories, for the satisfaction of the judgment in
full together with costs, interest and damages for delay, if
for any reason the appeal is dismissed or the judgment is
affirmed, and to satisfy in full such modification of the
judgment and such costs, interests and damages as the Ap- 177

Notice of Appeal.

- 178 pellate Court may adjudge and award, then the above obligation to be void else to remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY
COMPANY,

By R. C. McPHERSON,

Attorney in fact

(Seal)

Endorsed:

Filed June 13, 1939.

Notice of Appeal.

- 179 (Name of Court and Title of Action.)

SIRS:

- 180 **YOU WILL PLEASE TAKE NOTICE** that the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, doing business under the name of Joseph A. Bass Co., hereby appeal to the United States Circuit Court of Appeals, for the Second Circuit, from the final judgment entered in the office of the Clerk of the United States District Court for the Western District of New York. on the 9th day of June, 1939, and from each and every part thereof.

Dated: Buffalo, N. Y., June 13, 1939.

Yours, etc.,

FRANK GIBBONS,

One of the Attorneys for the Defendants,
Fleisher Engineering & Construction Company,
Joseph A. Bass, Royal Indemnity Company, and
Maryland Casualty Company,
618-630 Walbridge Building,
Buffalo, N. Y.

Stipulation to Record.

To:

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Hon. May C. Sickmon,
Clerk of the United States District Court,
For the Western District of New York.

and to

Edwin J. Culligan, Esq.,
Attorney for the Plaintiff.

Endorsed:

Filed June 13, 1939.

Stipulation to Record.

182

(Name of Court and Title of Action.)

IT IS HEREBY STIPULATED AND AGREED by and between the counsel for the respective parties hereto that the appeal by the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, from the final judgment entered in this action on the 9th day of June, 1939 to the United States Circuit Court of Appeals, for the Second Circuit, be heard and determined on the foregoing record and the papers therein contained, which shall constitute the transcript of record on such appeal, consisting of the following documents: 183

1. Complaint of the use plaintiff.
2. Praecipes for appearance of defendants, Fleisher Engineering & Construction Co. and Royal Indemnity Company, and for voluntary appearance of the defendants Joseph A. Bass, doing business as Joseph A. Bass Co., and Maryland Casualty Company.

Stipulation to Record.

- 184 3. Separate answers of the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company.
4. Interrogatories under Rule 33.
5. Answers to interrogatories.
6. Notice of motion on behalf of the defendants for summary judgment.
7. Order denying defendant's motion for summary judgment.
- 185 8. Opinion of Hon. John Knight, rendered on motion by defendants for summary judgment.
9. Opinion of Hon. John Knight rendered on motion by defendants for summary judgment in the case of United States of America for the use and benefit of J. H. Welch Company.
10. Notice of motion on behalf of plaintiff for summary judgment.
11. Affidavit of George S. Hallenbeck.
- 186 12. Order directing summary judgment for plaintiff.
13. Final judgment entered pursuant to the order.
14. Assignment of errors.
15. Supersedeas bond.
16. Notice of appeal.

IT IS FURTHER STIPULATED that a summons was duly issued upon the complaint and served upon defendant,

Stipulation to Record.

Fleisher Engineering & Construction Co. by the United States Marshal for the Western District of New York on April 13, 1938, and on the defendant, Royal Indemnity Company, by the United States Marshal for the Southern District of New York on the 11th day of April, 1938, and that proof of such service was filed in the clerk's office on April 13, 1938, and that any and all portions of the record omitted from the foregoing is unimportant upon any question to be presented to the court upon this appeal. 187

• Dated, Buffalo, N. Y., June 30th, 1939.

FRANK GIBBONS, 188
One of the Attorneys for the Appellants.

EDWIN J. CULLIGAN,
Attorney for Plaintiff.

Clerk's Certificate.

(Name of Court and Title of Action.)

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I, MAY C. SICKMON, Clerk of the United States District Court, for the Western District of New York, do hereby certify that the foregoing is a correct transcript of the record of the United States District Court, for the Western District of New York, in the above entitled action as agreed upon by the parties as shown by the stipulation hereto annexed.

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IN WITNESS WHEREOF I have caused the seal of the said court to be hereunto affixed at the City of Buffalo, in the Western District of New York, this 5th day of July, in the year One Thousand Nine Hundred and Thirty-nine and in the Independence of the United States of America in the One Hundred and Sixty-third Year.

MAY C. SICKMON,
Clerk.

(Seal)

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[fol. 65] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1939

No. 75

(Argued October 6, 1939. Decided November 13, 1939)

UNITED STATES OF AMERICA, for the Use and Benefit of
George S. Hallenbeck, Doing Business under the Assumed
Name and Style of Hallenbeck Inspection and Testing
Laboratory, Plaintiff-Appellee,
against

FLEISHER ENGINEERING & CONSTRUCTION CO., JOSEPH A. BASS,
Doing Business as Joseph A. Bass Co., Royal Indemnity
Company and Maryland Casualty Company, Defendants-
Appellants, and Other Defendants Named But Not Served
With the Summons

Appeal from United States District Court for the Western
District of New York

The above action was brought by the United States under the so-called Miller Act of August 24, 1935, Chapter 642, Sections 1, 2, 3 and 4, (40 U. S. C. A. Sections 270a, 270b, 270c [fol. 66] and 270d), to recover upon a government payment bond for labor and materials furnished in the construction of the superstructure of Kenfield Housing Project H-6703 in Buffalo, N. Y. The bond was furnished by the contractors Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., to the United States, wherein the contractors were principals, and Royal Indemnity Company and Maryland Casualty Company and others were sureties. From a summary judgment for \$1,130.53 entered on motion of the plaintiff against the defendants Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., and their sureties Royal Indemnity Company and Maryland Casualty Company, the latter appeal. Affirmed.

Before L. Hand, Swan and Augustus N. Hand, Circuit
Judges

Gibbons, Pottle & Pottle, Attorneys for Defendants-Appellants; Frank Gibbons, Counsel.

Edwin J. Culligan, Attorney and counsel for Plaintiff-Appellee.

AUGUSTUS N. HAND, Circuit Judge:

George S. Hallenbeck, doing business under the name of Hallenbeck Inspection & Testing Laboratory, performed certain work during the months of March, April and May, 1937, in inspecting and testing materials on the Kenfield Housing Project No. H-6703 at Buffalo under an agreement [fol. 67] with Easthom-Melvin Co., Inc., whereby he was to be paid by the latter \$1,012.87.

The United States acting through the Federal Administrator of Public Works entered into a contract with Fleisher Engineering & Construction Co. and Joseph A. Bass (doing business as Joseph A. Bass Co.) whereby the latter were to furnish all the labor and materials and perform all work required for the construction of the superstructure for the Housing Project. The Easthom-Melvin Co., Inc., was a subcontractor of these concerns, and the labor performed by Hallenbeck under his agreement with the Easthom-Melvin Co., Inc., was required to be performed by Fleisher Engineering & Construction Co. and Bass under their contract with the United States and actually was performed with the knowledge, consent and approval of the main contractors. The Easthom-Melvin Co., Inc., neglected to pay Hallenbeck the amount which was admittedly owing to him. Thereupon, within ninety days after the date when payment became due, he wrote to the project engineer who represented the government in superintending the performance of the contract a letter notifying the engineer of his claim and of the default of Easthom-Melvin Co., Inc., in paying it and sent a copy of the letter by mail in a postpaid envelope to Fleisher Engineering & Construction Co. Each notification was received, but the letter sent to Fleisher Company was sent by ordinary, and not by registered, mail. A copy of the letter of notification was not mailed to Bass. The notice showed on its face the amount claimed by Hallenbeck, that his contract was with the Easthom-Melvin Co., Inc., and that the items were for inspection and testing work.

The United States brought the present suit on behalf of Hallenbeck to recover upon a payment bond furnished by Fleisher Engineering & Construction Co. and Joseph A. Bass, the contractors, and by Royal Indemnity Company and Maryland Casualty Company as sureties. Under this [fol. 68] bond, which was in standard government form, the

contractors and the sureties bound themselves in the amount of \$79,988 jointly and severally as follows:

"If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

The plaintiff moved for a summary judgment upon the claim of Hallenbeck which was granted by Judge Knight. From that judgment an appeal was taken to this court.

The Miller Act (U. S. C. A. § 270a (2) requires persons entering into a contract for the construction of any public work of the United States to furnish "a payment bond with a surety or sureties * * * for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person." The bond upon which this suit was brought was furnished in pursuance of the Act.

The Act (U. S. C. A. § 270b, subdivisions (a) and (b),) defines the rights of persons furnishing labor or materials for a public contract in respect of which a payment bond has been furnished as follows:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, * * * and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such [fol. 69] payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the ma-

terial for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

[fol. 70] The only question for consideration is whether in view of the provisions of Section 270b, subdivision (a) of the Miller Act Hallenbeck, called in the briefs "the use plaintiff", gave sufficient notice to the original contractors to enable him to bring suit on the payment bond.

We feel no doubt that the notice complied with the statute as to its contents. It was not, however, sent by registered but only by ordinary mail and therefore did not conform to the provisions of Section 270b (a) in respect to method of mailing. Furthermore, it was only mailed to Fleisher Engineering & Construction Co. and no separate notice was mailed to Joseph A. Bass. On a motion for summary judgment made by the United States on behalf of Hallenbeck the District Court held that the notice sent to Fleisher Engineering & Construction Co. by ordinary mail satisfied the requirements of the statute and that such a notice to one of the contractors was sufficient to bind the other. We hold that his disposition of the motion was correct and accordingly that the judgment should be affirmed.

It is admitted that the notice was in writing and sent by mail and reached one of the two contractors who had jointly and severally agreed to perform the contract. The statute

does not in terms make sending a notice by "registered mail" a condition of a right of action by or on behalf of one furnishing labor or materials in the prosecution of the work provided for in a public contract and we are confident that Section 270b, subdivision (a) should receive no such interpretation.

It is to be observed that subdivision (a) affords a right of action to a person in Hallenbeck's situation "upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor. . . ." The following sentence provides how the notice is to be served but contains no language making the right of action dependent upon the mode of service. The [fol. 71] object of requiring notice to the principal contractor was doubtless to enable him to withhold payments from a subcontractor until the latter should pay his own men who had worked on the job. The apparent purpose of providing for notice by "registered mail" was to insure receipt of the notice. But where, as here, receipt of a written notice is conceded, the mode of transmission becomes unimportant and the provisions as to mode of delivery should be regarded as directory and not mandatory.

A statute like the present, giving a remedy on a payment bond to laborers and materialmen, is remedial and under the authorities should be liberally construed. That this is the proper rule of interpretation would appear from the decision of the Supreme Court in *A. Bryant Co. v. N. Y. Steam Fitting Co.*, 235 U. S. 327, 337. There the third proviso of the amended Materialmen's Act, requiring notice by a creditor bringing suit on a payment bond to be given to other creditors was held not to impose a condition upon the imposition of liability on the surety. See also *Fleischmann v. United States*, 270 U. S. 349, 360; *Illinois Surety-Co. v. John Davis Co.*, 244 U. S. 376, and *Vermont Marble Co. v. National Surety Co.*, 213 Fed. 429, (C. C. A. 3).

The decisions by the Supreme Court of Kansas in *Breedlove v. General Baking Co.*, 138 Kan. 143; *Eckl v. Sinclair Refining Co.*, 133 Kan. 285; *Honn v. Elliott*, 132 Kan. 454, and *Weaver v. Shanklin Walnut Co.*, 131 Kan. 771, cited by Judge Knight in the court below, apparently support his view that the provision of the Miller Act for giving notice to the contractor by registered mail is merely directory. The Kansas statute provided that "no proceedings for compen-

sation shall be maintainable * * * unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such claim to him by registered mail * * *". Such language may have been thought by [fol. 72] its express terms to have created a condition upon which all rights of action were predicated. In *Breedlove v. General Baking Co.*, 138 Kan. 143, on which the defendants lay much stress, proof of delivery of the notice of claim was lacking. The claimant relied on a presumption of delivery arising from mailing, though there was no proof that the notice bore the correct address of the employer, or that it was received. In the other three Kansas decisions notices sent otherwise than by registered mail having been actually received were treated as satisfying a statute providing for delivery by registered mail.

The defendants in the present case chiefly rely on the decision of this court in *Mason & Hanger Co. v. Sharon*, 219 Fed. 526. There a section of the New York Employers' Liability Act provided that notice of the injury should be addressed to the principal place of business. The notice was sent to a branch office and it was held that such a method of giving notice was insufficient even though the notice was received. It could be argued perhaps that a notice addressed to a branch office might not reach the proper official so that the provision requiring notice to be sent to the principal office was to be regarded as mandatory, but unless that decision can be distinguished from the case at bar in this way, we cannot see how the result was justified.

In *Rogers v. Village of Port Chester*, 234 N. Y. 182, a provision of a village charter that a notice of claim should be presented to a designated village official was held mandatory. But there the charter provided that: "The omission to present any such claim in the manner and within the time mentioned shall be a bar to any action against the village * * *".

Appellants' contention that notice to Fleisher Engineering & Construction Co. alone, even though sufficient in respect to manner and form, did not bind Joseph A. Bass, a joint contractor, is clearly without merit. Notice to one of two [fol. 73] joint obligors or contractors has from ancient times been held to convey notice to the other in respect to matters affecting the joint adventure or obligation. *Tevis v. Ryan*,

233 U. S. 273, 287; Northern Ill. Coal Co. v. Cryder, 361 Ill. 274; Knight v. Fifield, 7 Cush. 263; Morse v. Aldrich, 1 Met. 544; Terry & Lowe v. Reding, Moore 555.

In Babcock v. Wells, 25 R. I. 23, and Snyder v. Sponable, 1 Hill (N. Y.) 567, notice to one having a joint interest was held insufficient to bind the other. But in neither of the two cases was there such a joint enterprise as to justify the inference that one party was authorized to receive notice that would be binding on the other. The parties there were only joint owners of a mortgage and joint purchasers of an interest in real estate respectively. In Rogers v. Burr, 105 Ga. 432, the agency of the person receiving the notice was found to have been for a limited purpose which had been fulfilled long before the notice was given. If that decision can be thought to cover a situation like the present, it would, we think, be against the clear weight of authority. Persons jointly contracting to erect a building so much resemble partners in their mutual relations that notice to one of them of the claims of third parties arising out of the joint adventure would seem, as a matter of common sense and business understanding, to be notice to the other.

The judgment for the plaintiff is affirmed.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of December one thousand nine hundred and thirty-nine.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES ex rel. GEORGE S. HALLENBECK, etc., Plaintiff-
Appellee,

vs.

FLEISHER ENGINEERING & CONSTRUCTION Co., et al., Defendants-Appellants, and Other Defendants Named But Not Served With the Summons

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel. /

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 75] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. George S. Hallenbeck, etc., v. Fleisher Engineering & Construction Co., et al., and other defendants named but not served with the summons. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 12, 1939. D. E. Roberts, Clerk.

[fol. 76] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF
NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 75, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. George S. Hallenbeck, etc., Plaintiff-Appellee, against Fleisher Engineering & Construction Co., et al., Defendants-Appellants, and other defendants named but not served with the summons, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of December, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR REHEARING AND ALLOWING
CERTIORARI—April 22, 1940

On Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8675)